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## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

February 7, 2008

The Honorable Michael B. Mukasey  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Dear Attorney General Mukasey:

We seek clarification from you after a statement made by the Department's spokesman following last week's oversight hearing that appears to contradict your testimony.

You were asked at the hearing about the scope of the Department's investigation into the CIA's destruction of videotapes showing its officers using harsh interrogation techniques, reportedly including waterboarding. Director Hayden of the CIA confirmed publicly this week that the CIA has used waterboarding.

In response to our questions about whether the investigation being conducted by acting U.S. Attorney John Durham would include not just the tapes' destruction, but also any illegal conduct shown on those tapes, you appeared to testify that it could. Your testimony was contradicted immediately after the hearing when, as reported in *The Washington Post*, Brian Roehrkasse, the Department's spokesman, said that nothing in your testimony "suggests that any of those who relied in good faith upon the Department's advice would be subject to criminal investigation."

In contrast to your testimony that the investigation would go where it leads and could include the conduct on the tapes if warranted, the Roehrkasse statement appears to foreclose any possibility of investigating whether actions recorded on the tapes evidence illegal conduct. If the Department of Justice has determined as a matter of policy that irrespective of evidence it will never investigate possible conduct in violation of legal prohibitions against torture, you should clarify your testimony to the Committee by disclosing that determination.

The Department's statement also heightens our concern about possible conflicts within the Department that could unduly constrain Mr. Durham's investigation. Indeed, concern about the Department's role in offering advice on the legality or advisability of the destruction of the tapes as well as advice on the legality of techniques used in the interrogations led to the December 10, 2007 letter sent to you before the hearing that asked how the Department would resolve conflicts arising from such advice.

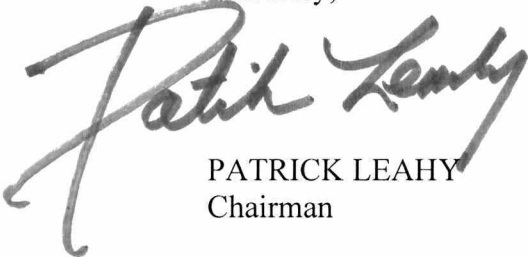
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These conflicts raise a question as to why you have not given Mr. Durham the "plenary" authority conferred on Patrick Fitzgerald by former Deputy Attorney General James Comey in the Plame investigation.

In light of the contradictions and ambiguities exacerbated by the Department's statement following the hearing, we believe that it is important for you to clarify the scope of the Department's investigation, and make explicit any policy limitations you or others have imposed on the Department's exercise of its law enforcement duties. Specifically, is Mr. Durham authorized to include in his inquiry an investigation into whether the conduct that was shown on the destroyed tapes was illegal? What steps have you taken to make sure the investigation remains independent and fair? If Mr. Durham is foreclosed from investigating the conduct engaged in during the interrogations, how and by whom is he so foreclosed, how and by whom will determinations be made whether that conduct was in violation of law, taking into consideration the Department's "advice"? How will the legitimacy and accuracy of the Department's "advice" be determined?

While we are sensitive to the need to avoid interfering with an ongoing criminal investigation, your testimony and the Department's subsequent statements have raised concerns that we hope you agree merit prompt response.

Sincerely,



PATRICK LEAHY  
Chairman



SHELDON WHITEHOUSE  
United States Senator